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No. 15-214

In the
Supreme Court of the United States

JOSEPH P. MURR, et al.,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a regulatory taking case, does the "parcel as a whole" concept as described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?

LIST OF ALL PARTIES

The parties to the proceeding are Petitioners Joseph P. Murr, Michael W. Murr, Donna J. Murr, and Peggy M. Heaver. The Respondents are the State of Wisconsin and St. Croix County.

CORPORATE DISCLOSURE STATEMENT

There are no parent corporations or publicly held companies in this case.

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PETITION FOR WRIT OF CERTIORARI

Joseph P. Murr, Michael W. Murr, Donna J. Murr, and Peggy M. Heaver respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals of Wisconsin.

OPINIONS BELOW

The decision below of the Court of Appeals of Wisconsin is unpublished and its disposition is reported at 359 Wis. 2d 675, 2014 WL 7271581 (Dec. 23, 2014). The opinion is reproduced in the Appendix at A-1.

The decision of the Circuit Court of St. Croix County is unreported and is reproduced in the Appendix at B-1.

The order of the Wisconsin Supreme Court denying a Petition For Review was issued April 16, 2015, and is reproduced in the Appendix at C-1.

JURISDICTION

The date of the decision sought to be reviewed is December 23, 2014. The Wisconsin Supreme Court denied further review on April, 16, 2015. On June 30, 2015, this Court entered an order extending the time for filing a petition for writ of certiorari to and including August 14, 2015.

Jurisdiction is conferred under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND ORDINANCE AT ISSUE

The Fifth Amendment of the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "[N]or shall any state deprive any person of life, liberty or property, without due process of law."

The ordinance at issue is St. Croix County Code of Ordinances, Land Use and Development, Subch. III. V, Lower St. Croix Riverway Overlay Dist. § 17.36 I.4.a. It is reproduced verbatim, in relevant part, in the Appendix at D-1. This ordinance is based on Wis. Admin. Code § NR 118.08(4).

STATEMENT OF THE CASE

For approximately 125 miles, the St. Croix River forms the boundary between Minnesota and Wisconsin. About 12 miles east of St. Paul, the river widens and is referred to as Lake St. Croix. Accessed directly by Interstate 94, Lake St. Croix is a popular recreation area. The lake has beautiful beaches and numerous homes along its shores. The lake boasts many recreational facilities, including city parks, a county park, a state park, various private resorts and marine facilities, and at least 10 boat access points. The area is part of the Minneapolis-St. Paul Metropolitan Statistical Area and has a large nearby population base.

On the Wisconsin lakeshore sits the City of Hudson, and just a few miles south is the Town of Troy. There, the lake features a large cove with over 40 waterfront parcels, appropriately known as the St. Croix Cove Subdivision. This is where the subject properties, referred to as Lot E and Lot F, are located.

A. Factual Background

The Petitioners are Donna Murr, Joseph Murr, Michael Murr, and Peggy Heaver (collectively, the Murrs). They are siblings. In 1960, their parents purchased Lot F. This lot was created by a Certified Survey Map and recorded on July 21, 1959.

Lot E sits adjacent to Lot F. Both are waterfront parcels approximately 100 feet wide, and over one acre in size. Lot E was also created by a Certified Survey Map and recorded 6 days later, on July 27, 1959.

There is no dispute that as originally created, each parcel was a separate and distinct legal lot, and each was allowed to be separately developed, used, and sold.

The Murrs' father was a plumber and he ran his own business, William Murr Plumbing, Inc. He was advised by his accountant to place title to Lot F in that business entity, which he did. Soon after purchasing Lot F, the Murrs' parents built a three bedroom recreational cabin, approximately 950 square feet. And so began a family legacy of enjoying many summers, long weekend holidays, birthdays, and 4th of July celebrations at the lake. Of course, the siblings grew up. They started their own families and soon the next generation of kids were enjoying the lakeside cabin. For the Murr family, the cabin has been the family gathering place.

The Murrs' parents had foresight. Recognizing the long-term potential of the area, they decided in 1963 to purchase a second parcel, the above-mentioned Lot E. Lot E has remained vacant and undeveloped to this day, but not so for the rest of the St. Croix Cove Subdivision. Almost all of the other waterfront parcels have been developed with homes and most are occupied year round by full-time residents.

Title to Lot E was in the Murrs' parents own names, rather than the plumbing company. There is no dispute that they bought this adjacent parcel for investment purposes. When the investment ripened, they planned to develop it separately from Lot F, or sell it to a third party.

In 1994, the parents transferred title to Lot F with the cabin to their six children. This was a gift to all of them; a way to keep the family legacy intact. In 1995, the investment Lot E was also transferred to the children; also a gift. Subsequently, two of the children quitclaimed their interests to their four siblings, again without any exchange of money. These four siblings are the current owners and the parties to this action.

In 2004, the Murr siblings began exploring the possibility of upgrading the cabin, including elevating it to diminish the threat of flood. They planned to sell investment Lot E, and use the proceeds from the sale to fund their project. It was then that they learned from government officials that they could no longer separately develop and sell Lot E.

Development of Lot E was precluded by regulations adopted in 1975 that required a "net project area" of at least one acre. Lot E is approximately 1.25 acres in overall size, but the

ordinance requires subtracting areas for slope preservation zones, floodplains, road rights-of-way, and wetlands, thereby yielding a net project area for development of Lot E of 0.5 acres.[1] But this half acre project area is not enough under the ordinance. There is no dispute that the remaining half acre has a suitable building site for a single family residence that meets the setback requirements. Nevertheless, because of the "net project area" deductions imposed by government, the parcel no longer meets the zoning requirements.

In short, when Lot E was created in 1959, and purchased in 1963, it was of sufficient size, width, and zoning to allow development of a single family house. Indeed, that is the use allowed for all the parcels within the St. Croix Cove Subdivision. However, because of the restrictions that came into place in 1975, the parcel was now defined as "substandard."

Despite being defined as substandard, Lot E would still be allowed to be developed if it was owned by *anyone other than the Murr siblings*. Under the ordinance, a grandfather clause provides that any lot created prior to January 1, 1976, as was Lot E, may still be developed as a single family residence *but only if* the lot "is in separate ownership from abutting lands."[2] Of course, the Murrs own the abutting parcel, Lot F. Because the Murrs own both parcels, this grandfather exception does not apply to them. Had

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[1] Lot F also had a similar net project area of .48 acres. Accordingly, it was also defined as substandard under the 1975 regulations.

[2] St. Croix County Code of Ordinances, § 17.36 I.4.a.1 (Appendix at D-1).

anyone else owned Lot E, that owner would be allowed to build a single family residence. Regrettably, the ordinance also precludes the Murrs from selling Lot E to anyone else unless it is combined with Lot F.[3]

B. Procedural Background

The Murrs sought relief from the ordinance by seeking a variance to allow using Lot E as a separate building site. They argued that on January 1, 1976, the lots were still in separate ownerships (split between the plumbing company and the Murrs' parents), and therefore the grandfather clause should apply. The County Board of Adjustment rejected that interpretation of the ordinance, and upon judicial review, the Wisconsin Court of Appeals affirmed. As stated in the decision below:

> In *Murr v. St. Croix County Board of Adjustment*, 2011 WI App 29, ¶¶ 1-2, 332 Wis.2d 172, 796 N.W.2d 837, we concluded the circuit court properly affirmed the County's denial of Donna Murr's request for a variance to separately sell or develop what are known as Lots E and F, two contiguous parcels on the St. Croix River.

App. at A-2 ¶ 2. The Wisconsin Supreme Court subsequently denied review. App. at A-5 ¶ 7.

Having exhausted their administrative remedies and after receipt of a final decision denying relief, the Murrs filed a complaint alleging an uncompensated taking of vacant Lot E. They contend that without the ability to sell or develop the lot, it is rendered economically useless. The Murrs contended below that

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[3] *Id.* § 17.36 I.4.a.2 (Appendix at D-1).

the situation parallels the facts of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (denial of all economically viable use is a taking).

C. The Wisconsin Court Rejects a Categorical Taking by Defining the Relevant Parcel as Including Both Lots E and F

The Wisconsin Court of Appeals applied federal takings law to reject the Murrs' claim for compensation.[4] The analysis begins with the recognition that the "federal and state constitutions do not prohibit the taking of private property for public use, but they do require that government provide just compensation for any taking." App. at A-7 ¶ 13. In footnote 7, the court quoted the Fifth Amendment's Takings Clause and noted its similarity to the Wisconsin constitutional provision. *Id.*

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[4] The Murrs presented their claim under the state constitutional provision, however, the Wisconsin Court of Appeals determined the takings analysis based on federal takings law, and most particularly this Court's decision in *Penn Central*. Where the state court of last resort *actually determines* a federal question, it does not matter whether the federal claim was properly before it in order to confer jurisdiction under 28 U.S.C. § 1257. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979). It is enough that the state court reached and decided the federal question, as though properly raised. *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971). Under these circumstances, the Court has recognized jurisdiction, including in takings cases. *See*, e.g., *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n.5 (1980) (taking claim raised under the Florida Constitution but general ruling of no unconstitutional taking was sufficient basis for Supreme Court consideration of the federal issue). *See generally* Stephen M. Shapiro, Supreme Court Practice § 3.19 (10th Ed., 2013).

Turning to the merits, the Wisconsin court recognized that defining the relevant parcel was central to analyzing the taking claim. The Murrs argued that the relevant parcel for takings purposes is investment Lot E, and only Lot E. They did not include any claim for a taking of Lot F. In contrast, the government defendants argued that for purposes of analyzing whether there was a denial of all economically viable use, the relevant parcel was Lot E *combined with* Lot F.

The Wisconsin appellate court ruled that because the two lots are contiguous, and happen to be owned by the same people, this Court's "parcel as a whole" rule from *Penn Central* requires combining the two parcels for takings analysis. As stated below:

> "[T]he United States Supreme Court has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel . . . ." Instead, to determine whether a particular government action has accomplished a taking, courts are to focus "'both on the character of the action and on the nature and extent of the interference with rights in the **parcel as a whole** . . . .'" (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978)).

App. at A-10 ¶ 18 (quoting *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 375-76, 548 N.W.2d 528 (1996) (emphasis added).

The Murrs argued that they had been deprived of at least one of their two separate and discrete parcels. From their perspective, these were two separate parcels, created as legally separate lots, taxed

separately, and purchased separately. The lots were never developed together, and were purchased for completely different reasons. But because the Murrs owned both parcels, the Wisconsin court ruled that together, these two parcels combined were the Murrs' "parcel as a whole." This conclusion was driven by the contiguous ownership.

> [T]he Murrs assert they have been wholly deprived of the use of at least one of their two separate parcels. We disagree. There is no dispute that the Murrs own contiguous property. Regardless of how that property is subdivided, **contiguousness is the key fact** . . . .

App. at A-10 ¶ 19 (emphasis added). The court repeated again that the Supreme Court of the United States "has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel." Accordingly, the court below concluded by proclaiming

> a well-established **rule** that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein.

App. at A-11 ¶ 20 (emphasis added).

Given this analysis of *Penn Central*, it was very easy for the Wisconsin court to find there was no taking as a matter of law.

> With the analysis properly focused on the Murrs' property as a whole, it is evident they have failed to establish a compensable taking, as a matter of law. There is no dispute that their property suffices as a

> single, buildable lot under the ordinance. Thus, the circuit court properly observed the Murrs can continue to use their property for residential purposes.

App. at A-12 ¶ 22.[5] Of course, as will be shown below, the "rule" that the Wisconsin court derives from *Penn Central* strikes a resounding gong highlighting the significant conflict that has developed among the state and federal courts concerning the "parcel as a whole" issue.

Based on this rationale, the court below concluded that "the Murrs' property, viewed as a whole, retains beneficial and practical use as a residential lot." App. at A-18 ¶ 31. The court concluded as a matter of law that the Murrs have not alleged a compensable taking. *Id.*

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[5] Under the ordinance, the Murrs were allowed to build on Lot E, or retain the cabin on Lot F, but not both. They could build on Lot E only "if they choose to raze the cabin." App. at A-12 ¶ 22.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I

THE "PARCEL AS A WHOLE" CONCEPT PRESENTS A CRITICAL ISSUE OF FEDERAL TAKINGS LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

A. Determining the Relevant Parcel Is a Critical Issue That Controls the Outcomes of Many Takings Claims

Under either the *Lucas* categorical taking for denial of all economically viable use, or the *Penn Central* ad hoc, multi-factor approach, a court must determine the value and use of the property before and after the application of the restricting ordinance. But in order to measure the lost value, a unit of property must be determined to be the denominator in that calculation. This Court recognizes this is a "critical question[]" in the takings analysis.

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the **critical questions** is determining how to define the unit of property "whose value is to furnish the denominator of the fraction."

Keystone Bituminous Coal Association v. DeBenedictus, 480 U.S. 470, 496 (1987) (quoting Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967) (emphasis added)). The Federal Circuit likewise explained:

> In many cases, as here, the definition of the relevant parcel of land is a **crucial antecedent** that determines the extent of the economic impact wrought by the regulation.

Lost Tree Village Corporation v. United States, 707 F.3d 1286, 1292 (Fed. Cir. 2013) (emphasis added). In takings involving parcels of land, this legal question is confronted in practically every case.

> Definition of the relevant parcel affects not only whether a particular regulation is a categorical taking under *Lucas*, but also affects the *Penn Central* inquiry into economic impact of the regulation on the claimant and on investment backed expectations. The relevant parcel determination is a question of law based on underlying facts.

Lost Tree Village, 707 F.3d at 1292.

B. This Court Recognizes the "Parcel as a Whole" Concept Has Been Inadequately Developed, and Requires Supreme Court Guidance, Yet the Court Has Been Unable to Reach the Issue in Previous Takings Cases

Fifth Amendment jurisprudence is greatly lacking in determining what is the "parcel as a whole." This Court's frustration and discomfort with the existing law has been expressly acknowledged. In *Lucas*, the Court explained:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since it does not make clear the "property interest" against which the loss of value is to be measured.

Lucas, 505 U.S. at 1016 n.7. This has resulted in inconsistent decisions.

> Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court.

Id. (comparing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), with *Keystone Bituminous Coal Association v. DeBenedictus*). Despite acknowledging the problem, the facts in *Lucas* did not present the opportunity to address the issue. *Lucas*, 505 U.S. at 1016 n.7.

The Court recognized again its "discomfort" with the "parcel as a whole" rule in *Palazzolo v. Rhode*

Island, 533 U.S. 606 (2001). But again, the circumstances did not allow reaching the issue.

> This contention asks us to examine the difficult, **persisting question** of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the parcel as a whole; but we have at times expressed **discomfort with the logic of this rule**, a sentiment echoed by some commentators. Whatever the merits of these criticisms, we will not explore the point here. Petitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari.

Id. at 631 (citations omitted; emphasis added).

One of the critiquing commentators expressly cited in *Palazzolo* is John Fee, whose article in the University of Chicago Law Review is recognized as a significant work in its effort to point the Court in a logical direction for addressing the relevant parcel question. *Palazzolo*, 533 U.S. at 631 (citing John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535 (1994). In his opening paragraphs to describe the problem, John Fee presents the classic hypothetical that mirrors exactly the facts of the case presented by the Murr family in this petition. The Murrs own two side-by-side lots, one that is restricted and not allowed to be independently developed and sold, and the other with long-standing residential use. Matching that description, the Fee article explains:

> What the Court [in *Lucas*] did not decide, however, is how to determine the relevant parcel of land that is subject to the regulatory taking inquiry. Suppose, for instance, that only one of Lucas's two parcels were subjected to the government regulation. Would there have been a taking of only that parcel? Or would the Court have analyzed the effect of the regulation on the two lots combined, finding that—because some beneficial use remained for the property as a whole—no taking had occurred?

Fee, 61 U. Chi. L. Rev. at 1535-36. That is precisely the factual context of this petition. The importance of the issue is well recognized, and the time and circumstances are ripe for this Court to finally address the issue.

C. The Factual Context Presented in This Petition Is Ideal for Providing Practical Guidance to the Relevant Parcel Question and How the "Parcel as Whole" Concept Is to Be Applied

This petition provides the Court with the best factual context for developing the parcel as a whole jurisprudence. First, and most important, the case involves land, traditional parcels, and common residential lots. Furthermore, the alleged taking is not of an unusual property interest. This is in contrast to cases such as *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), where, in the context of a moratorium that only temporarily precluded all use, the plaintiff argued for a taking of a "temporal slice" of the fee interest. The petitioners' "conceptual severance" argument was

unpersuasive, as the Court relied on the parcel as a whole concept to reject dividing the property into temporal segments. *Id.* at 331. While important, such precedent does not answer the far more common and persistent problem facing the Murr family.

Similarly, *Andrus v. Allard*, 444 U.S. 51 (1979), has little bearing on most property owners. There, a prohibition on commercial transactions in eagle feathers was not a taking. The Court would not divide the property interest into discrete segments, and affirmed that "where an owner possesses a full bundle of property rights, the destruction of one strand of the bundle is not a taking." *Id.* at 65-66. In contrast, the Petitioners here allege a taking of the entire fee interest of Lot E. The question presented focuses on the problem of contiguous ownership, and that issue, as pointed out by John Fee, has not been answered by this Court, but should be.

Other cases similarly derive from unusual fact patterns. *See*, e.g., *Penn Central* (alleging a taking of air space); *Keystone Bituminous Coal Association* (taking allegation based on requirement that pillars of coal be left in place). In contrast, the factual context here provides the opportunity for understanding how the parcel as a whole concept applies in the typical situation of horizontal divisions of property into lots and parcels where the allegation is a taking of the entire fee interest. This is a question that needs resolution.

> The Supreme Court has thus failed to provide clear guidance to courts on the denominator question—especially in horizontal cases. Not only has the Court never decided a case involving the horizontal

> division of land, but it has failed to define "parcel as a whole." Until this issue is resolved, lower courts will continue to face the crucial question: economically viable use of *what* land?

Fee, 61 U. Chi. L. Rev. at 1545 (italics in original). This case squarely presents that opportunity.

D. State and Federal Courts Are in Substantial Conflict

In the context of actual land (as contrasted with air space, temporal segmentation, or cases involving merely a strand in the bundle of rights), the federal and state courts have been left without clear guidance from this Court on when to aggregate parcels for takings analysis. Not surprisingly, the result has been inconsistent and contradictory approaches.

On one extreme, the Wisconsin court below focused on contiguity as the "key fact" and held that the *Penn Central* "parcel as a whole" concept establishes a "rule that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein." App. at A-11 ¶ 20. Michigan is similar. *See Bevan v. Brandon Township*, 475 N.W.2d 37, 43 (Mich. 1991) (despite division into separate, identifiable lots, the court ruled that "contiguous lots under the same ownership are to be considered as a whole").

Not willing to go that far, the Massachusetts Supreme Court did not establish a "rule" based on commonly owned contiguous property, but instead viewed those facts as establishing a rebuttable presumption for defining the parcel as a whole.

> We conclude that the extent of contiguous commonly owned property gives rise to a rebuttable presumption defining the relevant parcel.

Giovanella v. Conservation Commission of Ashland, 857 N.E.2d 451, 458 (Mass. 2006). That court based its presumption on a view of common sense. "Common sense suggests that a person owns neighboring parcels of land in order to treat them as one unit of property." *Id.* But the court also confessed that such a rule is "the most easily measured." *Id.*

In sharp conflict, Florida makes the opposite presumption. There, adjoining lots created under the state laws are presumed to be separate.

> [W]e believe that a presumption of separateness as to vacant platted urban lots is reasonable and would facilitate the determination of the separateness issue in the absence of contrary evidence.

Department of Transportation, Division of Administration v. Jirik, 498 So. 2d 1253, 1257 (Fla. 1986). That court had a different view of common sense, pointing out instead that the formal process of subdividing lots should not so easily be disregarded by government in defending takings claims. *Id.*

> Furthermore, an owner of platted city lots cannot easily abandon or disregard formally established divisions because planning boards, city commissions, and other governmental entities must approve such decisions.

Id. The court concluded, "We therefore hold that vacant city property constitutes presumptively separate units if platted into lots." *Id.* If the Murrs were in Florida, they likely would have received compensation for the taking of Lot E.

Idaho and Ohio also are more likely to treat separate parcels separately. *See City of Coeur d'Alene v. Simpson*, 136 P.3d 310 (Idaho 2006) (reversing trial court decision that aggregated two contiguous parcels); *State ex rel. R.T.G., Inc. v. Ohio*, 780 N.E.2d 998, 1009 (Ohio 2002) (approximately 100 acres outside of the regulated area was not included in the relevant parcel even though it was contiguous and commonly owned).

Similar division is found among the federal courts. The D.C. Circuit Court of Appeals combined nine separate parcels under common ownership for takings analysis in *District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999). The concurrence pointed out:

> The majority applies an apparent presumption that contiguous parcels under common ownership should be treated as one parcel for purposes of the takings analysis. This presumption tends to reduce the likelihood that courts will order compensation.

Id. at 885 (Williams, J., concurring). But the majority responded to this criticism by pointing out, "Unless and until the [Supreme] Court instructs otherwise, we are obliged to judge within the bounds of established precedent." *Id.* at 882. Of course, the problem is the differing views of just what is the established precedent with regards to the parcel as a whole.

Other federal courts do not view common ownership as creating a presumption of aggregation.

> Combining the two tracts for purposes of the regulatory takings analysis involved here, simply because at one time they were under common ownership, or because one of the tracts sold for a substantial price, cannot be justified. The trial court's conclusion to the contrary was error.

Palm Beach Isles Associates v. United States, 208 F.3d 1374, 1381 (Fed. Cir. 2000). *See also American Savings & Loan Association v. County of Marin*, 653 F.2d 364, 369-71 (9th Cir. 1981) (contiguously owned parcels not presumptively aggregated).

In short, the various approaches to treating contiguous, commonly owned properties in defining the relevant parcel is a significant issue that warrants review by this Court. As pointed out by Professor Mandelker,

> The Supreme Court's views on this issue are conflicting, and no principled basis for determining the segmentation of property interests has emerged.

Daniel R. Mandelker, *New Property Rights Under the Takings Clause*, 81 Marq. L. Rev. 9, 16 (1997). The time has arrived for this area of law to finally be addressed.

> Defining the relevant parcel based solely on contiguous common ownership has an advantage in that it is easy to apply. But it does little to serve the policies underlying the Takings Clause. As a standard of just

> compensation, it is simply illogical. Why should the law declare that a landowner may not own more than one adjacent "parcel" of land, each independently protected by the Fifth Amendment? A unity-of-ownership standard, for its simplicity, results in arbitrary treatment of landowners and harmful distortions of real estate markets.

John E. Fee, *Of Parcels and Property, in* Taking Sides on Takings Issues: Public and Private Perspectives 101, 112 (Thomas E. Roberts, ed. 2002). The arbitrariness of such a rule is evident in the present case where if *any person other than the Murrs* owned Lot E, that owner would be able to construct a home under the grandfather clause in the ordinance. It is only the Murrs, as the abutting owners, who are forced into the merger of these otherwise discrete and separate lots. This significant issue warrants review.

> How to define the horizontal boundaries of land for purposes of determining whether there is a regulatory taking—the very issue the Court dodged in *Palazzolo*—is perhaps the **most significant unresolved question** [concerning the Takings Clause].

Id. at 102 (emphasis added). The present case provides the opportunity that was absent in *Palazzolo* and *Lucas*.

CONCLUSION

The time and opportunity has arrived for this Court to finally resolve a persistent and key issue in regulatory takings law. The "parcel as a whole" concept has never been applied by this Court to a horizontal division of a fee interest in land. Yet, this factual context will be most useful to lower federal and state courts. For all the reasons expressed, it is urged that the petition for writ of certiorari be granted.

DATED: August, 2015.

Respectfully submitted,

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COURT OF APPEALS DECISION

DATED AND FILED
December 23, 2014

Appeal No. 2013AP2828 Cir. Ct. No. 2012CV258

STATE OF WISCONSIN **IN COURT OF APPEALS**

DISTRICT III

JOSEPH P. MURR, MICHAEL W. MURR, DONNA J. MURR AND PEGGY M. HEAVER,

PLAINTIFFS-APPELLANTS,

v.

STATE OF WISCONSIN AND ST. CROIX COUNTY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for St. Croix County:

SCOTT R. NEEDHAM, Judge. Affirmed.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Joseph Murr, Michael Murr, Donna Murr and Peggy Heaver (collectively, the Murrs) appeal a judgment dismissing their regulatory takings claim upon motions for summary judgment by the State of Wisconsin and St. Croix County. We agree with the circuit court that the challenged regulatory action, an ordinance that effectively merged the Murrs'

two adjacent, riparian lots for sale or development purposes, did not deprive the Murrs of all or substantially all practical use of their property. Accordingly, we affirm.

BACKGROUND

¶2 This appeal represents the second time the Murrs' dispute with the County over the use of their property has come before this court. In ***Murr v. St. Croix County Board of Adjustment***, 2011 WI App 29, ¶¶1-2, 332 Wis. 2d 172, 796 N.W.2d 837, we concluded the circuit court properly affirmed the County's denial of Donna Murr's request for a variance to separately sell or develop what are known as Lots E and F, two contiguous parcels on the St. Croix River.[1]

¶3 Our earlier opinion sets forth the history of the property, which we briefly restate here. Furthermore, as this is an appeal from a decision granting summary judgment against the Murrs, we view all pertinent facts and reasonable inferences from those facts in the light most favorable to the Murrs. *See* ***Thomas ex rel. Gramling v. Mallett***, 2005 WI 129, ¶4, 285 Wis. 2d 236, 701 N.W.2d 523.

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[1] Donna Murr was the only named party in the previous suit. *See* ***Murr v. St. Croix Cnty. Bd. of Adjustment***, 2011 WI App 29, ¶4 n.4, 332 Wis. 2d 172, 796 N.W.2d 837. Her interests are aligned with those of her siblings in the present matter, so for ease of reading we will refer to the Murrs collectively in our recitation of the facts pertaining to the earlier suit.

In addition, our previous decision did not specifically identify the lots using the "E" and "F" nomenclature. The Murrs represent this nomenclature comes from an unrecorded subdivision map. For ease of reading, we will supplement the statement of facts in our earlier opinion with the appropriate designation.

¶4 The Murrs' parents purchased Lot F in 1960. ***Murr***, 332 Wis. 2d 172, ¶4. They built a cabin near the river and transferred title to their plumbing company. ***Id.*** In 1963, the Murrs' parents purchased an adjacent lot, Lot E, which has remained vacant ever since. ***Id.*** The Murrs allege Lot E was purchased as an investment property, with the intention of developing it separate from Lot F or selling it to a third party.

¶5 The lots have a common topography. Each is bisected by a 130-foot bluff, but they are moderately level at the top and near the river. ***Id.*** Together, the lots contain approximately .98 acres of net project area.[2] ***Id.*** The Murrs' parents transferred Lot F to the Murrs in 1994, followed by Lot E in 1995.[3] ***Id.***

¶6 The 1995 transfer of Lot E brought the lots under common ownership and resulted in a merger of the two lots under ST. CROIX COUNTY, WIS., CODE OF ORDINANCES, LAND USE & DEV., Subch. III.V, LOWER ST. CROIX RIVERWAY OVERLAY DIST. § 17.36I.4.a. (July 1, 2007) (the Ordinance), which has been in place since the mid-1970s. *See* ***State v. St. Croix Cnty.***, 2003 WI App 173, ¶4, 266 Wis. 2d 498, 668 N.W.2d 743. The Ordinance prohibits the individual development or sale of adjacent, substandard lots under common ownership, unless an

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[2] "Net project area" means "developable land area minus slope preservation zones, floodplains, road rights-of-way and wetlands." WIS. ADMIN. CODE § NR 118.03(27) (Feb. 2012).

[3] Although not material to our decision because ownership was at all times common, we note that the Murrs' parents conveyed the contiguous properties to two other siblings in addition to the Murrs. The record indicates those siblings subsequently quitclaimed their ownership interests to the Murrs.

individual lot has at least one acre of net project area.[4] However, if abutting, commonly owned lots do not each contain the minimum net project area, they together suffice as a single, buildable lot. ***Murr***, 332 Wis. 2d 172, ¶11 n.9.

¶7 Years later, after repeated flooding, the Murrs decided to flood proof the cabin on Lot F and sell Lot E as a buildable lot. Among other things, the Murrs sought a variance to separately use or sell their two

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[4] As set forth in our earlier decision, the Ordinance reads:

> **(4) SUBSTANDARD LOTS** Lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:
>
> (a) 1. The lot is in separate ownership from abutting lands, or
>
> 2. The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.
>
> (b) All structures that are proposed to be constructed or placed on the lot and the proposed use of the lot comply with the requirements of this subchapter and any underlying zoning or sanitary code requirements.

Murr, 332 Wis. 2d 172, ¶10 & n.8 (noting that the Ordinance's internal paragraph lettering and numbering is illogical and potentially confusing, such that use of lettering and numbering of the administrative code provision on which the Ordinance is based, WIS. ADMIN. CODE § NR 118.08(4) (Feb. 2012), is more appropriate). As we previously noted, the administrative code provision is "not a model of clear draftsmanship," and we renew our call, implicit in our previous decision, for the DNR to review its language. *See id.*, ¶11.

contiguous lots. ***Id.***, ¶5. The DNR and county zoning staff opposed the Murrs' application and, following a public hearing, the St. Croix County Board of Adjustment denied the application. ***Id.***, ¶6. The Murrs sought certiorari review and the circuit court affirmed the portion of the Board's decision relevant to this appeal. ***Id.*** On appeal, we agreed with the circuit court that the Board acted appropriately. ***Id.***, ¶2. The Wisconsin Supreme Court denied the Murrs' subsequent petition for review.

¶8 The Murrs then filed a complaint against the State and County pursuant to WIS. STAT. § 32.10,[5] alleging that the Ordinance resulted in an uncompensated taking of their property under WIS. CONST. art. I, § 13.[6] The Murrs alleged that the Ordinance and the administrative code provision on which it was patterned, WIS. ADMIN. CODE § NR 118.08(4) (Feb. 2012), deprived them of "all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot." They asserted Lot E could not be put to alternative uses like agriculture or commerce due to its size, location and steep terrain. Finally, they alleged the lot was usable only for a single-family residence, "and without the ability to sell or develop it the lot is rendered useless."

¶9 The State and County separately sought summary judgment. Their motions essentially advanced the

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[5] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[6] The Murrs represented they had served the State and County with a Notice of Claim that demanded compensation for the taking of their land. The County denied the claim by letter dated October 3, 2011. The State did not issue a denial, but the claim was deemed denied due to the passage of time.

same arguments: the Murrs' claim was time barred; the Murrs failed to exhaust their administrative remedies; they had no protectable property right to sell a portion of their property; and they were not deprived of all or substantially all the beneficial use of their property.

¶10 The circuit court granted summary judgment to the County and State. The court first concluded the Murrs' claim was time barred, reasoning that the Ordinance "had immediate economic consequence[s]" when it was enacted. Despite this conclusion, the court also reached the merits of the Murrs' claim. It determined that the applicable law required it to analyze the effect of the Ordinance on the Murrs' property as a whole, not each lot individually. Accordingly, the court held there was no taking because the Murrs' property, taken as a whole, could be used for residential purposes, among other things. Specifically, the court noted the undisputed fact that, even under the Ordinance, "[a] year-round residence could be built on top of the bluff and the residence could be located entirely on Lot E, entirely on Lot F, or could straddle both lots." Further, the court determined the Murrs' property—again, defined as Lots E and F combined—retained significant value, citing an appraisal opining that the merger decreased the property value by less than ten percent. The court denied a subsequent motion for reconsideration, and the Murrs now appeal.

DISCUSSION

¶11 We review a grant of summary judgment de novo, applying the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is

appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). As the moving parties, the County and the State must show a defense that would defeat the Murrs' claim. *See* ***Voss v. City of Middleton***, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991).

¶12 The Murrs argue the circuit court erred for two reasons. First, they assert their claim is not time barred. They reason their claim was not ripe until their request for a variance was denied and they exhausted their appellate rights from that decision. Second, the Murrs argue the Ordinance deprived them of all, or substantially all, beneficial use of their property. We conclude the Murrs' takings claim fails on its merits as a matter of law. Accordingly, we do not reach the issue of whether their claim was timely filed and assume, without deciding, that it was. *See* ***Raasch v. City of Milwaukee***, 2008 WI App 54, ¶2, 310 Wis. 2d 230, 750 N.W.2d 492 (citing ***Gross v. Hoffman***, 227 Wis. 296, 299-300, 277 N.W. 663 (1938)) (where one issue is dispositive, we need not address other issues).

¶13 The federal and state constitutions do not prohibit the taking of private property for public use, but they do require that the government provide just compensation for any taking. ***260 N. 12th St., LLC v. DOT***, 2011 WI 103, ¶43, 338 Wis. 2d 34, 808 N.W.2d 372.[7] "A 'taking' need not arise from an actual physical

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[7] The Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, (continued...)

occupation of land by the government." ***Eberle v. Dane Cnty. Bd. of Adjustment***, 227 Wis. 2d 609, 621, 595 N.W.2d 730 (1999). A "taking" can also occur if the government enacts a regulation "that is 'so onerous that its effect is tantamount to a direct appropriation.'" ***E-L Enters., Inc. v. Milwaukee Metro. Sewerage Dist.***, 2010 WI 58, ¶22, 326 Wis. 2d 82, 785 N.W.2d 409 (quoting ***Lingle v. Chevron U.S.A. Inc.***, 544 U.S. 528, 537 (2005)). The Murrs allege the latter type of taking—a regulatory or constructive taking—occurred here. Whether the Ordinance constituted a taking of the Murrs' property without compensation is a question of law. *See* ***Zealy v. City of Waukesha***, 201 Wis. 2d 365, 372, 548 N.W.2d 528 (1996).

¶14 A landowner who believes the government has taken his or her property without instituting formal condemnation proceedings may bring an inverse condemnation claim under WIS. STAT. § 32.10 to recover just compensation. *See* ***E-L Enters.***, 326 Wis. 2d 82, ¶36. That statute, which is the legislative fulfillment of WIS. CONST. art. I, § 13, is, by its terms, designed solely to deal with the traditional exercise of the government's eminent domain power vis-à-vis physical occupation. ***E-L Enters.***, 326 Wis. 2d 82, ¶36. However, our supreme court has concluded regulatory takings are also cognizable under § 32.10. *See* ***E-L Enters.***, 326 Wis. 2d 82, ¶37.

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[7] (...continued)
"mandates that private property shall not be taken for public use, without just compensation.'" ***260 N. 12th St., LLC v. DOT***, 2011 WI 103, ¶43, 338 Wis. 2d 34, 808 N.W.2d 372 (quoting U.S. CONST. amend. V). Similarly, the Wisconsin Constitution prohibits the taking of private property "'for public use without just compensation therefor.'" ***Id.*** (quoting WIS. CONST. art. I, § 13).

¶15 The landmark case in this respect was ***Howell Plaza, Inc. v. State Highway Commission***, 66 Wis. 2d 720, 226 N.W.2d 185 (1975). There, the court concluded "that there need not be an actual taking in the sense that there be a physical occupation or possession by the condemning authority . . . ." ***Id.*** at 730. To state a claim under WIS. STAT. § 32.10 in the absence of physical occupation, the facts alleged must demonstrate that a government restriction "deprives the owner of all, or substantially all, of the beneficial use of his property." ***Id.*** at 726; *see also* ***E-L Enters.***, 326 Wis. 2d 82, ¶37.

¶16 Here, the Murrs seek compensation solely for the alleged taking of Lot E. They contend that, given the application of the Ordinance, Lot E "serves no purpose or use" and has no value because it "cannot be sold." The Murrs argue the circuit court erred by examining the beneficial uses of Lots E and F in combination. Instead, citing ***Jonas v. State***, 19 Wis. 2d 638, 121 N.W.2d 235 (1963), and ***Lippert v. Chicago & Northwestern Railway Co.***, 170 Wis. 429, 175 N.W. 781 (1920), the Murrs contend there is a genuine issue of material fact as to whether Lots E and F were used together such that they may be considered as one for purposes of the regulatory takings analysis.

¶17 Contrary to the Murrs' assertions, the issue of whether contiguous property is analytically divisible for purposes of a regulatory takings claim was settled in ***Zealy***. There, our supreme court concluded that before considering whether a regulatory taking has occurred, "a court must first determine what, precisely, is the property at issue . . . ." ***Zealy***, 201 Wis. 2d at 375. The landowner in ***Zealy*** argued the City of Waukesha accomplished a regulatory taking by

creating a conservancy district over 8.2 acres of his 10.4-acre parcel, thereby precluding residential development on the majority of the property. ***Id.*** at 370-71. The court, however, rejected the owner's attempt to so segment the property, concluding a "landowner's property in such a case should be considered as a whole." ***Id.*** at 376. Because the landowner retained over two acres zoned for business and/or residential use, and farming was permitted within the conservancy district, no compensable taking occurred. ***Id.*** at 378-80.

¶18 In so holding, the court credited both the Supreme Court's historical formulation of the takings inquiry and practical considerations. "[T]he United States Supreme Court has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel . . . ." ***Id.*** at 375-76. Instead, to determine whether a particular government action has accomplished a taking, courts are to focus "'both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . .'" ***Id.*** at 376 (quoting ***Penn Cent. Transp. Co. v. New York City***, 438 U.S. 104, 130-31 (1978)). This analysis preserves a municipality's authority to place reasonable limits on the use of property without requiring the payment of compensation for every incidental infringement of property rights. *See* ***id.*** (quoting ***Keystone Bituminous Coal Ass'n v. DeBenedictis***, 480 U.S. 470, 498 (1987)).

¶19 The Murrs contend ***Zealy*** is distinguishable because that case turned on the owner's ability to use one large parcel, whereas the Murrs assert they have been wholly deprived of the use of at least one of their two separate parcels. We disagree. There is no

dispute that the Murrs own contiguous property. Regardless of how that property is subdivided, contiguousness is the key fact under ***Zealy***. *See* ***Zealy***, 201 Wis. 2d at 375-76 (observing the Supreme Court "has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel . . . ."). This is evident from our supreme court's subsequent decision in ***R.W. Docks & Slips v. State***, 2001 WI 73, 244 Wis. 2d 497, 628 N.W.2d 781. There, a developer partially completed a marina and condominiums but the DNR, noting an emergent weedbed along the shoreline, refused to grant a permit for the dredging necessary to complete the remaining 71 boat slips. ***Id.***, ¶¶8-9. Applying ***Zealy***, the court held that the developer's subsequent takings claim must be analyzed "in light of the marina as a whole rather than the parcel that was to have contained the 71 boat slips." ***Id.***, ¶27.

¶20 Neither ***Jonas*** nor ***Lippert***, the authorities on which the Murrs rely, cast any doubt upon what has become a well-established rule that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein. *See* ***R.W. Docks & Slips***, 244 Wis. 2d 497, ¶¶25-27 & n.5 (reaffirming ***Zealy*** and declining to revisit the issue). ***Jonas*** and ***Lippert*** both involved formal condemnation proceedings; they were not regulatory takings cases. *See* ***Jonas***, 19 Wis. 2d at 639; ***Lippert***, 170 Wis. at 429-30. As such, the issue was not whether there had been a taking but rather the amount of compensation due.

¶21 When properly viewed as valuation cases, it becomes clear ***Jonas*** and ***Lippert*** are inapplicable. The property owners in those cases argued they were

entitled to "severance" damages—an amount representing diminutions in the value or use of other property attributable to the loss of the condemned property. *See* ***Jonas***, 19 Wis. 2d at 642; ***Lippert***, 170 Wis. at 430-32. The availability of such damages turns on "[u]nity of use," a concept which assesses whether the properties "are used as a unit so that each is dependent and related to the use of the other, or [whether they are] . . . devoted to separate and distinct uses, so as to constitute independent properties." *See* ***Jonas***, 19 Wis. 2d at 642; ***Lippert***, 170 Wis. at 431-32; *see also* ***Spiegelberg v. State***, 2006 WI 75, ¶14, 291 Wis. 2d 601, 717 N.W.2d 641 ("The unity of use rule permits a condemnee to receive compensation when a taking from one property must be considered in terms of its effect on another property, in order for those affected . . . to be fully compensated."); ***Bigelow v. West Wis. Ry. Co.***, 27 Wis. 478, 487 (1871). Nothing to which the Murrs have directed our attention persuades us the unity of use concept should be applied to determine whether a regulatory taking has occurred in the first instance.

¶22 With the analysis properly focused on the Murrs' property as a whole, it is evident they have failed to establish a compensable taking, as a matter of law. There is no dispute that their property suffices as a single, buildable lot under the Ordinance. *See* ***Murr***, 332 Wis. 2d 172, ¶11 n.9. Thus, the circuit court properly observed the Murrs can continue to use their property for residential purposes. Specifically, the Ordinance allows the Murrs to build a year-round residence on top of the bluff, if they choose to raze their cabin located near the river. Notably, this use may include Lot E, as the new residence could be located entirely on Lot E, entirely on Lot F, or it could straddle

both lots. The Murrs' ability to use Lot E for residential purposes, standing alone, is a significant and valuable use of the property. *See* ***Palazzolo v. Rhode Island***, 533 U.S. 606, 631 (2001) (regulation permitting a landowner to build a substantial residence does not leave property economically idle under the Takings Clause). Accordingly, the Murrs have not been denied "all or substantially all practical use[]" of their parcel. ***Zealy***, 201 Wis. 2d at 374.

¶23 The Murrs, at least implicitly, acknowledge that they could locate a residence on Lot E if they so choose. However, they then focus on what Lot E cannot be used for. The Murrs point to deposition testimony indicating Lot E is unsuitable for use in wildlife conservation, agriculture or forestry. In framing the issue in this way, the Murrs ignore the applicable test. We are not concerned with what uses are prohibited or what are the "highest and best uses," but rather only what use or uses remain. *See* ***Zinn v. State***, 112 Wis. 2d 417, 424, 334 N.W.2d 67 (1983) (taking occurs when a restriction placed on the property practically or substantially renders the property useless for all reasonable purposes).

¶24 "Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property." ***Keystone Bituminous Coal Ass'n***, 480 U.S. at 498. The critical question is whether the property owner has been denied "all or substantially all practical uses of [the] property. . . ." ***Zealy***, 201 Wis. 2d at 374. Here, as in ***Zealy***, the "extent of the parcel at issue . . . is clearly identified, and just as clearly the parcel retains substantial uses." ***Id.*** at 380.

¶25 The Murrs obliquely suggest that even if their property has not suffered a loss of all or substantially all its practical use, they are nonetheless entitled to compensation because a partial taking has occurred. In addition to the "categorical" takings analysis, set forth above, courts also use an "ad hoc factual, traditional takings inquiry" that analyzes the "nature and character of the governmental action, the severity of the economic impact of the regulation on the property owner, and the degree to which the regulation has interfered with the property owner's distinct investment-backed expectations in the property." ***R.W. Docks & Slips***, 244 Wis. 2d 497, ¶17.

¶26 With respect to the nature and character of the government action, when a property owner does "not suffer the loss of substantially all of the beneficial uses of his land," we need not consider whether the regulation advances a legitimate state interest. ***Zealy***, 201 Wis. 2d at 380-81. In any event, the Murrs do not contend the County lacked a valid public purpose for enacting the Ordinance. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments). Indeed, in our earlier decision regarding the Murrs' property, we observed that the Ordinance is part of a federal and state effort to protect the "national wild and scenic rivers system," including the Lower St. Croix River. ***Murr***, 332 Wis. 2d 172, ¶10. The Ordinance and similar laws were designed to "preserve property values while limiting environmental impacts." ***Id.***, ¶14.

¶27 To that end, our supreme court's decision in ***Just v. Marinette County***, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), is instructive. There, a shoreland zoning

ordinance established a conservancy district over wetlands within 1,000 feet of a lake and prohibited any filling without a permit. ***Id.*** at 12-14. This, in effect, prevented "the changing of the natural character of the land. . . ." ***Id.*** at 17. The landowner asserted the ordinance was unconstitutional because it amounted toconstructive taking without compensation. ***Id.*** at 14. The court disagreed, finding the ordinance a valid exercise of the police power to "protect navigable waters and the public rights therein from the degradation and deterioration which results from uncontrolled use and development of shorelands." ***Id.*** at 10, 14-16. The court emphasized that the owner could still use the land "for natural and indigenous uses," and remarked that "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." ***Id.*** at 17. ***Just*** establishes that because of the strong public interest in preventing degradation of the natural environment, property owners advancing takings claims based on environmental legislation have a much more difficult time showing they were deprived of all or substantially all practical use of their property. *See* ***Howell Plaza, Inc. v. State Highway Comm'n***, 92 Wis. 2d 74, 85-86, 284 N.W.2d 887 (1979).

¶28 The Murrs also argue a genuine issue of material fact exists regarding the severity of the Ordinance's economic impact on their property. They contend the degree to which the Ordinance compromised the value of their property is disputed. The Murrs disagree with the circuit court's conclusion that the property decreased in value by less than ten percent when considered as a whole versus as two separate lots.

Rather, the Murrs argue the record includes expert opinions that Lot E is "up to 90% less valuable than land that can be independently developed."

¶29 Any disagreement between experts as to the value of the property does not create a genuine issue of material fact in this case. The Murrs' valuation argument assumes they had an unfettered right to use their land as they pleased at the inception of their ownership. This is not so. The Ordinance was on the books for nearly two decades before the Murrs became the common owners of Lots E and F. This is precisely why we concluded in the Murrs' earlier appeal that any diminution in their property's value occurred at the time they took title to both contiguous lots:

> Because the provisions are already effective prior to subsequent owners' acquisition of their lots, there is no concern that the provisions would deprive those persons of their property. Any effect on property values has already been realized.
>
> Further, because Murr is charged with knowledge of the existing zoning laws, *see* ***State ex rel. Markdale Corp. v. Board of Appeals of Milwaukee***, 27 Wis. 2d 154, 162, 133 N.W.2d 795 (1965), as a subsequent owner she was already in a better position than any person who owned at the [Ordinance's] effective date. Unless she or a subsequent owner brought her vacant lot under common ownership with an adjacent lot, that parcel would forever remain a distinct, saleable, developable site. Unlike those who owned on the effective date, she had the option to acquire, or not acquire, an

> adjacent lot and merge it into a single more desirable lot.

Murr, 332 Wis. 2d 172, ¶¶16-17. In sum, the Murrs knew or should have known that their lots were "heavily regulated from the get-go." *See* ***R.W. Docks & Slips***, 244 Wis. 2d 497, ¶29.

¶30 This reasoning also disposes of the Murrs' assertion that they have always intended Lot E to be developed or sold individually. We regard this as an argument under the factor assessing the degree to which the regulation has interfered with the property owner's distinct investment-backed expectations in the property.[8] The Murrs presumably knew that bringing their substandard, adjacent parcels under common ownership resulted in a merger under the Ordinance. Accordingly, even if the Murrs did intend to separately develop or sell Lot E, that expectation of separate treatment became unreasonable when they chose to acquire Lot E in 1995, after their having acquired Lot F in 1994.[9] In short, the Murrs "never possessed an

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[8] While the precise contours of their argument are unclear, to the extent the Murrs are attempting to argue their expectation of separate use should inform the contiguous property rule of ***Zealy v. City of Waukesha***, 201 Wis. 2d 365, 375-76, 548 N.W.2d 528 (1996), we disagree. A property owner's subjective, desired use is irrelevant to determining the extent of the property at issue for purposes of a regulatory taking. ***See id.*** at 377-78 ("Looking to a landowner's anticipated use of various parcels and sub-parcels of land in order to determine the extent of the parcel at issue would require ascertaining a landowner's subjective intent before being able to evaluate a possible takings claim.").

[9] In their reply brief, the Murrs argue that ***Palazzolo v. Rhode Island***, 533 U.S. 606 (2001), stands for the proposition that "acquiring land after enactment of a regulation is not fatal to a

(continued...)

unfettered 'right'" to treat the lots separately. *See* ***Murr***, 332 Wis. 2d 172, ¶30.

¶31 Based on the foregoing, we conclude the circuit court properly granted summary judgment in favor of the County and State. The undisputed facts establish that the Murrs' property, viewed as a whole, retains beneficial and practical use as a residential lot. Accordingly, we conclude they have not alleged a compensable taking as a matter of law.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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[9] (...continued)
regulatory takings claim." While that is an arguably accurate recitation of ***Palazzolo***'s holding, it does not benefit the Murrs here. We reject any notion that the Murrs' investment-backed expectations can be used to limit ***Zealy***'s holding regarding how the relevant property is defined. *See* ***Zealy***, 201 Wis. 2d at 375-77. Future generations continue to have the right to challenge unreasonable limitations on the use and value of land, regardless of when the property was purchased. *See* ***Palazzolo***, 533 U.S. at 627-28. This does not mean, however, that they can expect their opinions about the future use of property to affect how the relevant property is defined for purposes of determining whether a regulatory taking has occurred.

STATE OF WISCONSIN CIRCUIT COURT

ST. CROIX COUNTY

JOSEPH P. MURR,
MICHAEL W. MURR,
DONNA J. MURR and
PEGGY M. HEAVER,

Plaintiffs,

-vs-

STATE OF WISCONSIN and
ST. CROIX COUNTY,

Defendants.

MEMORANDUM DECISION AND ORDER
Case No. 12 CV 258

INTRODUCTION

Plaintiffs (the "Murrs") filed this lawsuit against St. Croix County and the State of Wisconsin alleging a regulatory taking of their property without just compensation. The Murrs own a cabin and 2. 52 acres of land with approximately 15 8 feet of frontage on the St. Croix River. The State and St. Croix County have both moved for summary judgment and an order dismissing the case. The issue on summary judgment is whether the County and State have taken the Murrs' property as a result of a denial of a variance to subdivide and separately sell a portion of their property.

FACTUAL BACKGROUND

This case involves residential property located in St. Croix County along the St. Croix River in the St. Croix Cove Subdivision. The St. Croix Cove Subdivision plat, which was created in the 1950s, identifies the Murrs' property as Lot E and Lot F.

Each lot is approximately 1.25 acres. Lots E and F came under common ownership of the Murrs in 1995 when the Murrs' parents completed a transfer of both lots to their children. The property is moderately level at the top and also below at the river level; however, it is bisected by a steep 130 foot bluff with the top and bottom of the lots being served by separate roads. Lots E and F each have less than 1 acre of building space. Lot F contains a cabin while Lot E remains vacant.

The Murrs' property is regulated by federal, state, county and local regulations. Congress enacted the National Wild and Scenic Rivers Act ("Act") in 1968 to preserve certain rivers for the enjoyment of present and future generations. The Act designates certain rivers as "wild, scenic, or recreational." Wild & Scenic Rivers Act, 16 USCA § § 1271-1287 (1968). Designated rivers are protected by landowners, river users, and through governmental regulations and programs. *Id.* Designation encourages recreation, agricultural practices, and residential development; it does not prohibit development or give the federal government control over private property. *Id.* Congress designated a portion of the St. Croix National Scenic Riverway as "wild, scenic, or recreational" under the Act. *Id.*

Following the designation of the St. Croix River, the Wisconsin Legislature enacted Wis. Stat. § 30.27(1), which recognizes the Lower St. Croix River as part of the national wild and scenic rivers system, and the legislature also enacted § 30.27(2), which requires the Department of Natural Resources (DNR) to "adopt, by rule, guidelines and specific standards for local zoning ordinances which apply to the banks, bluffs and bluff tops of the Lower St. Croix River." Wisconsin also enacted Wis. Stat. § 30.27(3), requiring all affected

municipalities to adopt ordinances at least as restrictive as those of the DNR and forcing the DNR and municipalities to adopt riverway zoning that complies with DNR standards.

The DNR adopted Admin. Code Chapter NR 118. The Town of Troy has its own Riverway ordinance serving a similar purpose to that enacted by St. Croix County in 1975 and revised it in 1977 to make it consistent with NR 118. The ordinance provides:

> SUBSTANDARD LOTS Lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:
>
> (a) 1. The lot is in separate ownership from abutting lands, or
>
> 2. The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.
>
> (b) All structures that are proposed to be constructed or placed on the lot and the proposed use of the lot comply with the requirements of this subchapter and any underlying zoning or sanitary code requirements.

The substandard lots provisions are the subject of the Murrs' regulatory taking claim in this action.

No attempts to obtain variances or construction permits were applied for until late 2004 or early 2005. It was around this time that the Murrs began considering subdividing their property, selling the portion contained in Lot E and building a residence outside of the existing cabin's footprint on Lot F. At this time, the Murrs discovered the regulations on the property prevented them from selling Lot E.

Because the substandard lot provisions barred this type of development, the Murrs requested the following variances from the County in 2006: (1) variance to sell or use two contiguous substandard lots (Lots E and F) in common ownership as separate building sites; (2) variance to reconstruct and expand a nonconforming structure outside its original footprint; (3) variance to fill, grade, and place a structure in the slope preservation zone; (4) special exception to fill and grade within forty feet of the slope preservation zone; (5) special exception to fill and grade over 2000 square feet; (6) variance to construct retaining walls and stairs inside the ordinary high-water mark setback; (7) variance to reconstruct a patio within the ordinary high-water mark setback; and (8) variance to construct a deck within the ordinary high-water mark setback.

The first variance request, to separately sell or use Lots E and F, is the subject of this lawsuit. The above listed variances/exceptions are the only ones ever filed to the Board of Adjustment. No formal application has been made to the Town, County or State since 2006.

The St. Croix County Board of Adjustment ("Board") conducted a public hearing in June 2006 and

denied all of the Murrs' requests in a written decision dated and filed on June 28, 2006. The Murrs sought certiorari review in St. Croix County Case 06 CV 545. After hearing arguments and viewing the property, the Court affirmed the Board's denial of the Murrs' request to sell or use Lots E and Fas separate building sites. However, the Court reversed the Board on the remaining seven requests.

In *Murr v. St. Croix Cnty. Bd Of Adj.*, 2011 WI App 29, 332 Wis.2d 172, 796 N.W.2d 837, the Wisconsin Court of Appeals reinstated the Board's original decision. What is particularly relevant from that decision is that the Court of Appeals affirmed the Board's denial of the request to separately sell or use Lots E and F. The Murrs argued that the substandard lot provisions did not apply to merge Lots E and F because the parcels did not come under common ownership until after the effective date identified in the ordinance. The Court of Appeals disagreed and held that the ordinance applied to all abutting properties that existed on the specified date, regardless of when they came under common ownership.

The Murrs subsequently commenced this action on March 15, 2012, claiming that a regulatory taking occurred by virtue of the application of NR 118 and the local ordinance adopted in conformity thereof. Both the State and County have moved for summary judgment.

LEGAL AUTHORITY

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact and that the moving party is entitled to judgment as a matter of law." Wis. Stat. §802.08(2). To make a *prima facie* case for summary judgment, the moving party bears the burden of establishing the absence of a genuine issue of material fact. If the moving party satisfies that burden, the court then examines the pleadings, affidavits and depositions to determine whether any material facts are in dispute that would entitle the opposing party to a trial. *See In re Cherokee Park Plat*, 334 N.W.2d 580, 583 (Wis. Ct. App. 1983). The nonmoving party must set forth specific facts showing the existence of a genuine issue for trial. *Maynard v. Port Publ'ns, Inc.*, 297 N.W.2d 500, 561(Wis.1980). Where the party opposing summary judgment fails to respond or raise an issue of material fact, the trial court is authorized to grant summary judgment. *Bd. of Regents of Univ. of Wis. Sys. V Musallem*, 94 Wis.2d 657, 673-74, 289 N.W.2d 801, 809 (Wis. 1980).

The sole issue before this Court is whether there is a genuine issue of material fact with respect to the whether the application of the substandard lot provisions to the Murrs' property constitutes a regulatory taking.

Timing and Statute of Limitations

Defendants argue the Murrs' lawsuit is time-barred due to the applicable statute of limitations. The Court agrees. It is well known that if a statute of limitations has run, a cause of action no longer exists. *Schafer v. Wegner*, 78 Wis. 2d 127, 254 N.W.2d 193 (1977). A six-year statue of limitations applies to a claim for inverse condemnation. Wis. Stat.§ 893.93(1)(a); *Pool v. City of Sheboygan*, 2007 WI 38, ¶ 21, 300 Wis. 2d 74, 729 N.W.2d 415. A cause of action

accrues on the date the injury is discovered or with reasonable diligence should be discovered. *Hansen v. A.H Robins, Inc.*, 113 Wis. 2d 550, 560, 335 N.W.2d 578 (1983). Reasonable diligence is defined as "such diligence as the majority of persons would use in the same or similar circumstances." *Spitler v. Dean*, 148 Wis. 2d 630, 638 N.W.2d 308 (1989).

Here, the substandard lot provisions have been in place since 1975 and those regulations had immediate economic consequence on the ability to develop the property at that time. With reasonable diligence, the Murrs easily could have discovered the existence of those provisions. At the latest, they should have exercised such diligence in 1995 when the lots came under common ownership of the Murrs. Furthermore, it is undisputed that the Murrs have actual knowledge of the substandard lot provision in 2004 or 2005, when they began discussions with St. Croix County regarding the sale and development of Lot E separately from Lot F. Even if the cause of action did not accrue until April 12, 2005, when the Murr's attorney sent an email regarding the Ordinance, the filing of the suit on March 15, 2012 would still be untimely under the six-year statute of limitations. The cases cited by the Murrs are distinguishable and do not change the fact that the Murrs' claim arose long before the Wisconsin Supreme Court denied their petition for review on May 24, 2011. Whether using 1975, 1995 or 2005 as the starting point, the result is the same: the Murrs' claim is barred by the applicable six year statute of limitations.

Regulatory Taking

Article I, § 13 of the Wisconsin State Constitution provides that "[t]he property of no person shall be

taken for public use without just compensation therefore." The threshold inquiry of this Court is whether the government action constitutes a "taking." *Zealy v. City of Waukesha*, 201Wis.2d365, 378, 548 N.W.2d 528 (Wis. 1996). A government's conduct constitutes a taking if: (1) the government actually and physically occupies private property; or (2) the government imposes a restriction or regulation that deprives an owner of all or substantially all of the beneficial use of his property. *See R. W. Docks & Slips v. State*, 2001WI 73, ¶¶13-15, 244 Wis.2d 497, 628 N.W.2d 781. A "reduction in economic value—even if dramatic—does not constitute a taking when the owner is left with some beneficial use of the land . . ." *Eternalist Found., Inc. v. City of Platteville*, 225 Wis. 2d 759, 773, 593 N.W.2d 84 (Wis. Ct. App. 1999). When determining whether a compensable regulatory taking has occurred, courts must evaluate the property in question as a whole. *Id.*

Here, the government has not "actually or physically" occupied the private property and thus the Murrs' central argument is the government has deprived them of all or substantially all of the beneficial use of their property. Specifically, the Murrs argue that a genuine issue of fact exists regarding the uses available to Lot E. It was created as a residential lot and is situated in the middle of a residential subdivision. The minimum lot size requirement means that Lot E cannot be sold or developed separately because it has less than one acre of net project area. The Murrs argue that there are no other practical, alternative uses for Lot E and that the regulations have deprived them of all economic value of the property; this Court disagrees.

The Murrs have several available options for the use and enjoyment of their property despite the denial of the variance. The Murrs can reconstruct and flood-proof the existing cabin in the same footprint, they can raise the cabin on fill or pylons and they can build a residence on top of the bluff as opposed to the river level. A year-round residence could be built on top of the bluff and the residence could be located entirely on Lot E, entirely on Lot F, or could straddle both lots. The Murrs retain recreational and residential use of the property despite the denial of the variance. Deposition testimony indicates that the Murrs regularly vacationed at the property and use it as a family gathering place. They have an elevated level of privacy because they do not have close neighbors and are able to swim and play volleyball at the property.

In addition, the market value of the property has not been significantly impacted by the denial of the variance to separately sell or develop the lots. A professional appraisal was conducted in 2012 based on 2006 property values. The appraiser concluded that the property as one lot has a market value of $698,000, while as two lots, the collective value is approximately $771,000, which is less than a ten percent difference.

This Court is persuaded that there is no genuine issue of material fact that would preclude summary judgment in favor of Defendants. This is not a regulatory taking and the claim fails as a matter of law. The motion for summary judgment is granted and this case is dismissed.

DECISION

Based on the foregoing **IT IS HEREBY ORDERED** that Defendants' motion for summary judgment is **GRANTED**. This is a final order for purpose of an appeal.

BY THE COURT:

Dated this 31st day
of October 2013.

S/ SCOTT NEEDHAM
Honorable Scott R. Needham

Circuit Court Judge
Branch III

OFFICE OF THE CLERK

Supreme Court of Wisconsin

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April 16, 2015

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You are hereby notified that the Court has entered the following order:

Appendix C–2

No. 2013AP2828 Murr v. State L.C.#2012CV258

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiffs-appellants-petitioners, Joseph P. Murr, Michael W. Murr, Donna J. Murr, and Peggy M. Heaver, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Diane M. Fremgen
Clerk of Supreme Court

ST. CROIX COUNTY CODE OF ORDINANCES, LAND USE & DEVELOPMENT

Subch. III.V, LOWER ST. CROIX RIVERWAY OVERLAY DISTRICT § 17.36, I.4.a.

4. SUBSTANDARD LOTS

Lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:

(a) 1. The lot is in separate ownership from abutting lands, or

2. The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.